TABLE OF CONTENTS

	Page
STATUTES INVOLVED	1
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. There Are No Special Or Important Reasons For Granting A Petition For Writ Of Certiorari To Review The Decision Of The Court Of Appeals	7
II. The Court Of Appeals Correctly Held That Alleged Violations Of The Illinois Meetings Of Public Agencies Act Do Not Give Rise To A Cause Of Action Cognizable By A Federal Court Nor Constitute A Violation Of A Federally Protected Constitutional Right	8
(a) The Meetings Of The Illinois Tollroad Authority By Their Very Nature Concerned The Acquisition Of Real Property For The Public Use In Extending The East-West Tollway And Were Therefore Exempt From The Provisions Of The Illinois Meetings Of Public Agencies Act	9
(b) The "Right" To A Public Hearing Exists Only By Virtue Of State Law And The Failure To Provide Such A Hearing Does Not Constitute A Deprivation Of Federal Due Process	11
(c) The Environmental "Rights" Allegedly Violated Without Due Process Of Law	

Are Not Recognized As Legal Rights In The Constitution, Statutes Or Case Law .. 15

III. The Court Of Appeals Was Correct In Holding That The National Environmental Policy Act Of 1969 And The Environmental Quality Improvement Act Of 1970 Are Applicable Only To Federal Agencies And Create No Substantive Rights Upon Which To Base A Federal Claim Against State Defendants 17

(a) The National Environmental Policy Act Of 1969 19

(b) The Environmental Quality Improvement Act Of 1970 34

CONCLUSION 37

APPENDIX A1-A12

TABLE OF AUTHORITIES

CASES

Bank of Columbia v. *Okely*, 4 Wheat. (17 U.S.) 235 (1819) 16

Boom Co. v. *Patterson*, 98 U.S. 403 (1878) 11

Brooks v. *Volpe*, 319 F. Supp. 90 (W.D. Wash., 1970) 25

Bucklein v. *Volpe*, 2 E.R.C. 1082 (N.D. Calif., 1970) ..6, 29

Calvert Cliffs v. *A.E.C.*, 449 F. 2d 1109 (C.A.D.C., 1971) 24, 29

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 18

Chicago, Blrlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1897) 10

City of Boston v. *Volpe*, —— F. 2d ——, (C.A.I., 1972) [4 E.R.C. 1337] 6, 26

Civic Improvement Committee v. *Volpe*, —— F. Supp. —— (W.D.N.C., 1972), 459 F. 2d 957 (4th Cir., 1972) 6, 25

Combs v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill., 1955), affirmed 349 U.S. 942 (1955) 5, 9, 14

Cuyahoga River Power Co. v. *City of Akron*, 240 U.S. 462 (1916) 10

Eli v. *Velde*, 451 F. 2d 1130 (4th Cir., 1971) 6, 26

Environmental Defense Fund v. *Corps of Engineers of U.S. Army*, 325 F. Supp. 749 (E.D. Ark., 1971) 6, 24, 26

Green Street Association v. *Daley*, 373 F. 2d 1 (7th Cir., 1967), *cert. denied* 387 U.S. 932 .....5, 9, 13

Harrison-Halsted Community Group, Inc. v. *Housing and Home Fin. Agency*, 310 F. 2d 99 (7th Cir., 1962), *cert. denied* 373 U.S. 914 .....5, 9, 12

Holden v. *Hardy*, 169 U.S. 366 (1898) 16

Investment Syndicates, Inc. v. *Richmond*, 318 F. Supp. 1038 (D. Oregon, 1970) 25

Izaak Walton League v. *Macchia*, 2 E.R.C. 1661 (D.N.J., 1971) 31-32

McQueary v. *Laird*, 449 F. 2d 608, (10th Cir., 1971) ..6, 30

Miltenberger v. *Chesapeake and Ohio Railroad Co.*, 450 F. 2d 971 (4th Cir., 1971) 6, 26

Missouri Pacific Railway Co. v. *Humes*, 115 U.S. 512 (1885) 16

Monroe v. *Pape*, 365 U.S. 167 (1960) 15

Mosher v. *City of Phoenix*, 287 U.S. 29 (1932) 15

Pennsylvania Environmental Council, Inc. v. *Barlett*, 315 F. Supp. 238 (M.D. Penn., 1970) 25
Rindge v. *Los Angeles County*, 262 U.S. 700 (1923) .5, 9, 11
San Antonio Conservation Society v. *Texas Highway Dept.*, 400 U.S. 968 (1970) 33
San Francisco Tomorrow v. *Romney*, 342 F. Supp. 77 (N.D. of Calif., 1972) 6, 30
Sierra Club v. *Hardin*, 325 F. Supp. 99 (D. Alaska, 1971) 25
Smyth v. *Ames*, 169 U.S. 466 (1898) 15
State Committee to Stop Sanguine v. *Laird*, 317 F. Supp. 664 (W.D. Wisc., 1970) 24
Tanner v. *Armco Steel*, 3 E.R.C. 1968 (So. Dist. of Texas, 1972) 6, 29
Weaver v. *Pennsylvania-Ohio Power & Light Co.*, 10 F. 2d 759 (6th Cir., 1926) 10
West Virginia Highlands Conserv. v. *Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir., 1971) 24
Wolf v. *Colorado*, 338 U.S. 25 (1949) 16
Zabel v. *Tabb*, 430 F. 2d 199 (5th Cir., 1970) 33

STATUTES

Environmental Quality Improvement Act of 1970, 42 U.S.C., § 4371 et seq. 1, 2, 5, 6, 17, 34-36, A9-A12
Fish and Wildlife Coordination Act of 1934, 16 U.S.C., § 661 et seq. 31
Illinois Meetings of Public Agencies Act, Chapter 102, Ill. Rev. Stat., § 42 et seq. 2, 4, 5, 8-16

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. 1, 2, 5, 6, 16, 17, 19-34, A1-A9
Refuse Act of 1899, 33 U.S.C., § 407 31
Rivers and Harbors Act of 1899, 33 U.S.C., § 403 31
United States Supreme Court Jurisdiction, 28 U.S.C. § 1254 ..... 4, 7
United States Supreme Court Rule 19, 28 U.S.C. 4, 7
Water Quality Improvement Act of 1970, 33 U.S.C., § 1151 31

LEGISLATIVE HISTORY

Congressional Record,
116 Cong. Rec., pp. S 4392-4425 and pp. H 2464-2473 (1970) 35
115 Cong. Rec., pp. 26571-26591 and pp. 29046-29065 (1969) 24
Hearings on S. 1075, S. 237 and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969) 23-24, 29
H. R. Reg. No. 91-765, 91st Cong., 1st Sess. 8 (1969) 23
Report of the Senate Committee on Interior and Insular Affairs, 115 Cong. Rec. 19010 (1969) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-469

BRADFORD TOWNSHIP, et al.,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATUTES INVOLVED

The National Environmental Policy Act of 1969, 42 U.S.C., §4321 et seq., and the Environmental Quality Improvement Act of 1970, 42 U.S.C., §4371 et seq., are statutes involved in this case, which are not fully set forth in the Appendix to the Petition for Writ of Certiorari and are set forth in full in the Appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there are any special and important reasons for granting a petition for writ of certiorari to review the decision of the Court of Appeals.

2. Whether the Court of Appeals was correct in holding that an alleged violation of the Illinois Meetings of Public Agencies Act did not state a claim under the Due Process Clause of the United States Constitution.

3. Whether the Court of Appeals was correct in holding that the National Environmental Policy Act of 1969 and the Environmental Quality Improvement Act of 1970 did not establish substantive environmental rights upon which these petitioners can state federal claims.

STATEMENT OF THE CASE

The petition for writ of certiorari seeks to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint for failure to state a claim upon which relief could be granted by a federal court.

This action was brought by alleged residents of certain Illinois counties to permanently enjoin the construction of a completely state-funded extension to an Illinois Tollway. The petitioners are various Illinois Townships through which a proposed extension of the Illinois East-West Tollway will allegedly be built, various alleged residents of the "area" through which said extension will allegedly be built and an unincorporated association known as the Northern Counties Social Action Council.

No federal officials or federal agencies are petitioners (App. 1, 2).

The respondents in this case are the Governor of the State of Illinois and the Director of the Department of Public Works and Buildings of the State of Illinois (sued as "ex officio members of the Illinois State Toll Highway Authority"), the Executive Administrator of the Illinois State Toll Highway Authority, and the members of the Illinois State Toll Highway Authority. No federal officials or federal agencies are respondents (App. 2).

The complaint alleges that the Illinois State Toll Highway Authority is in the process of acquiring land for the construction of an extension to the Illinois East-West Tollway; that the said tollway extension will have a detrimental effect on the environment of the area through which it passes; and that the respondents have not taken environmental factors into consideration in planning the said highway extension allegedly in violation of various laws of the United States and of the United States Constitution. The allegations as to the detrimental environmental effect are general and would apply to the construction of any highway anywhere: farm land will be taken on which to build the tollroad; cars and trucks with gasoline engines will use the tollroad; the tollroad will introduce far more industry into the area and this, in turn, will introduce chemical pollutants into the atmosphere; and the tollroad "will irretrievably stimulate the further sprawl of urban concentration with its attendant pollution." Nowhere in the complaint is it alleged that the federal government, federal funds or any federal agency or federal official is in any way involved with any of the matters alleged therein (App. 1-14).

Federal jurisdiction is purported to exist by virtue of recent Congressional enactments establishing environ-

mental policy which respondents contend are procedural in nature and applicable only to federal projects, and the alleged failure of the respondents to comply with an Illinois statute relating to public hearings which allegedly deprived the petitioners of due process of law. Although respondents contend that public hearings were in fact held,[1] the respondents have in connection with their motion to dismiss treated the allegation of no hearings held as correctly stating the facts and contend that such hearings were not required and that a lack of such hearings in any case would not violate due process. (App. 3, 8 and 9).

SUMMARY OF ARGUMENT

I. This case does not merit review by writ of certiorari.

(a) Review by certiorari is not a matter of right and there are no special or important reasons for granting such a review in this case. 28 U.S.C. §1254; Rule 19 of Supreme Court Rules, 28 U.S.C.

(b) The issues present in this case have uniformly been decided adversely to the petitioners' position in numerous cases and there is no conflict in the courts as to the effect of the laws involved. (See Argument under II and III).

II. The Court of Appeals correctly ruled that alleged violations of the Illinois Meetings of Public Agencies

---

1. Such was the holding of the Circuit Court of Lee County, Illinois in a condemnation proceeding wherein the same counsel of record for petitioners herein contested respondent's right to take certain property for the highway in question. Illinois State Toll Highway Authority v. Karn, No. 71-6L-220 (Appeal pending before Appellate Court of Illinois, Second District, No. 71-248).

Act, Chap. 102, Ill. Rev. Stat., §42 et seq., do not state a federal cause of action.

(a) The meetings involved in this case involved the acquisition of property by eminent domain and were specifically exempt from the provisions of the Illinois Act. Chap. 102, Ill. Rev. Stat., §42 (d).

(b) The courts have uniformly held that the failure to hold a public hearing before instituting state condemnation proceedings, whether or not such a hearing is required by statute, does not constitute a deprivation of federal due process. *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923); *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied* 373 U.S. 914; *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill., 1955), *affirmed* 349 U.S. 942 (1955).

(c) The environmental rights which petitioners alleged were infringed upon without due process, are not recognized legal rights entitled to the protection of due process (See Argument).

III. The Court of Appeals correctly ruled that the National Environmental Policy Act of 1969 and the Environmental Quality Improvement Act of 1970 are applicable only the federal agencies and create no substantive rights.

(a) The National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq. (NEPA) establishes the Council on Environmental Quality and sets up certain procedural requirements

for federal agencies aimed at requiring those agencies to take environmental factors into consideration in planning federal projects and providing Congress with the necessary facts upon which to base environmental legislation. NEPA has no application to the state-funded tollway project involved in this case since it applies only to state projects or state agencies and creates no substantive environmental rights. *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972); *City of Boston* v. *Volpe*, —— F. 2d —— (C.A. 1, 1972) [4ERC 1337]; *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir. 1971); *Miltenberger* v. *Chesapeake and Ohio Railway Co.*, 450 F. 2d 971 (4th Cir. 1971); *McQueary* v. *Laird*, 449 F. 2d 608 (10th Cir. 1971); *Environmental Defense Fund* v. *Corps. of Engineers of the U.S. Army, et al.*, 325 F. Supp. 749 (E.D. Ark. 1971); *San Francisco Tomorrow* v. *Romney*, 342 F. Supp. 77 (N.D. Calif. 1972); *Tanner* v. *Armco Steel*, 3 E.R.C. 1968 (So. Dist. of Texas 1972); *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. of Calif. 1970).

(b) The Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371, et seq. established the Office of Environmental Quality to provide the professional and administrative staff for the Council on Environmental Quality and insure that federal agencies are implementing the procedural dictates of NEPA. This Act has no application to the state-funded tollway project involved in this case since it applies only to state projects and creates no substantive environmental rights. (See Argument).

ARGUMENT

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS.

A review on writ of certiorari is not a matter of right and is granted only where there are special or important reasons therefor. 28 U.S.C. §1254; Rule 19 of Supreme Court Rules, 28 U.S.C. The situations which would merit review by certiorari, as set out in the Supreme Court Rules, are not present in the instant case: The decision of the Court of Appeals is not in conflict with the decisions of any other court, including the Supreme Court; there are no important questions of federal law decided by the Court of Appeals which need to be settled by this court; and there are no matters present in this case which require the exercise of the court's supervision. Rule 19 of Supreme Court Rules, 28 U.S.C.

As will appear more fully in the sections that follow, the issues present in this case have uniformly been decided adversely to the petitioners' position in numerous cases and there is no conflict in the courts as to the effect of the laws involved. The petitioners make no attempt in their petition to point out any special or important reasons for granting review by certiorari and their silence in this regard attests to the fact that no appropriate reason for granting certiorari is present in this case.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT ALLEGED VIOLATIONS OF THE ILLINOIS MEETINGS OF PUBLIC AGENCIES ACT DO NOT GIVE RISE TO A CAUSE OF ACTION COGNIZABLE BY A FEDERAL COURT NOR CONSTITUTE A VIOLATION OF A FEDERALLY PROTECTED CONSTITUTIONAL RIGHT.

The Court of Appeals was correct in its holding that alleged violations of the Illinois Meetings of Public Agencies Act do not constitute a proper federal claim. The court stated:

> "Plaintiffs-appellants allege that no public hearings were held as required by the Illinois Meetings of Public Agencies Act. Suffice it to say that this is a state statute and, if valid, might provide a cause of action in the state courts. It does not give rise to a cause of action cognizable by a federal court, nor does a failure to follow the requirements of the Act constitute a violation of a federally protected constitutional right." (Appendix to Petition, 6A).

The allegations pleaded by the petitioners in their complaint, which was dismissed for failure to state a federal claim, were insufficient to even allege a breach of the Illinois Meetings of Public Agencies Act, Chapt. 102, Ill. Rev. Stats. 1971, §42 et seq. The meetings in question concerned the acquisition of real property and were specifically exempt from the provisions of the Act. Chap. 102, Ill. Rev. Stats. 1971, §42(d). Moreover, the specific exemption of such meetings from the requirements of the Act, makes it clear that the Illinois legislature did not intend by this Act to thereby place limitations on the State's power of eminent domain.

Even if the petitioners' allegations could be construed as alleging a breach of Illinois law with regard to public hearings, such a breach might entitle them to a remedy in the Illinois courts—but it would not be the basis of a federal claim arising under the Constitution or laws of the United States. The right to a public hearing exists only by virtue of State law and the failure to provide such a hearirg does not constitute a deprivation of federal due process. *Rindge* v. *Los Angeles County*, 262 U.S. 700 (1923); *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied* 373 U.S. 914; *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955), *affirmed* 349 U.S. 942 (1955).

The alleged environmental rights which petitioners contend they were deprived of without due process as a result of the alleged failure to hold public meetings are not legal rights entitled to the protection of due process.

(a)

THE MEETINGS OF THE ILLINOIS TOLLROAD AUTHORITY BY THEIR VERY NATURE CONCERNED THE ACQUISITION OF REAL PROPERTY FOR THE PUBLIC USE IN EXTENDING THE EAST-WEST TOLLWAY AND WERE THEREFORE EXEMPT FROM THE PROVISIONS OF THE ILLINOIS MEETINGS OF PUBLIC AGENCIES ACT.

Section 42 of the Meetings of Public Agencies Act, Chapter 102 Ill. Rev. Stat., §42, in pertinent part, states as follows:

> "All official meetings open to the public—Exceptions. All meetings . . . shall be public meetings except for . . .
>
> (d) meetings where the acquisition of real property is being considered, or where a pending court proceeding against or on behalf of the particular governmental unit is being considered, but no other portion of such meetings may be closed to the public . . ."

It is obvious that all meetings to consider the extension of a tollroad would certainly by their very nature be meetings where both the acquisition of the real property on which to build the extension and the institution of eminent domain proceedings will be considered. Any such meetings would be exempt from the provisions of the Illinois Meetings of Public Agencies Act. Therefore, since the pertinent meetings would be exempt from the provisions of the Act, the complaint fails to state a claim even under Illinois law. This appears from the face of the complaint itself and is a proper ground for dismissal for failure to state a claim.

The petitioners contend that the Illinois Meetings of Public Agencies Act constitutes a limitation by the State on its power of eminent domain and the failure to comply with this limitation would be a violation of due process. It is apparent from the fact that the Act specifically exempts meetings to consider the acquisition of real property that the Illinois legislature could not have intended that it be a limitation on the State's eminent domain power. Moreover, the cases cited by the petitioners in support of this proposition of law are not in point. *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462 (1916) and *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897) and *Weaver* v. *Pennsyl-*

vania-Ohio Power & Light Co., 10 F. 2d 759 (6th Cir. 1926), are cases where the condemning bodies were allegedly attempting to acquire property without compensation or for private interests without public necessity in clear violation of the 14th Amendment of the U. S. Constitution. In the case at bar, there is no allegation that the State of Illinois is attempting to acquire property without payment of compensation or for private interests. *Boom Co.* v. *Patterson*, 98 U.S. 403 (1878) cited by petitioners was a case transferred to the federal courts on the basis of diversity of citizenship and did not even involve an alleged federal claim.

(b)

THE "RIGHT" TO A PUBLIC HEARING EXISTS ONLY BY VIRTUE OF STATE LAW AND THE FAILURE TO PROVIDE SUCH A HEARING DOES NOT CONSTITUTE A DEPRIVATION OF FEDERAL DUE PROCESS.

The Illinois Meetings of Public Agencies Act is a law of the State of Illinois and no comparable provisions appear in the United States Constitution or in any federal statute. For a breach of any of the provisions of the Illinois Meetings of Public Agencies Act recourse can be had to the Illinois courts only, and no claim for relief exists in a federal court as there is no provision for such relief under the Constitution or laws of the United States.

In a long line of decisions this court and other courts have consistently and uniformly held that the failure to hold such meetings does not result in the deprivation of rights guaranteed by the due process clause of the United States Constitution. The Supreme Court of the United States, in *Rindge Co.* v. *Los Angeles County*, 262 U.S.

700 (1923), an appeal from highway condemnation proceedings which were instituted without prior notice to the owners and without public hearing of any kind, stated at page 709 of its opinion:

> "The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and *a hearing thereon is not essential to due process in the sense of the 14th Amendment.*' *Bragg* v. *Weaver*, 251 U.S. 57, 58, 64 L. Ed. 135, 136, 40 Sup. Ct. Rep. 62."

As in *Rindge*, the case now before this court involves the alleged deprivation of a federal right by failure to hold a public hearing before instituting state condemnation proceedings. The only factual distinction between the instant case and *Rindge* is that in the instant case a state statute *requires* that such public meetings be held (although, as argued previously, said statute specifically exempts meetings where the acquisition of real property is being considered), while in *Rindge* there was no such statute. The existence of a state statute, however, is not enough to give rise to a federal right. The state statute creates only a state remedy, and the *Rindge* holding that no *federal* right has been violated, is still applicable.

Two decisions by the Court of Appeals for the Seventh Circuit support the position that the existence of such a statutory requirement does not create any new rights: *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. de-*

nied 373 U.S. 914; and *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932. In each of these cases a federal statute required that a public hearing be held by the governmental agency involved prior to instituting condemnation proceedings, much the same as the Illinois Act provides.[1]

In the *Green* case the court stated at page 7 of its opinion:

> "In *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency, supra*, similar claims of the inadequacy of a hearing were made, supported by the same jurisdictional allegations. As has already been stated, we held there that neither Section 105 (d) of the Housing Act nor Section 10 of the Administrative Procedure Act provides the basis for a federal right to judicial review of an urban renewal plan. We see no reason to reexamine our position in that case. Moreover, *no substantial federal question of due process is raised. Rindge Co.* v. *Los Angeles County*, 262 U.S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955). The district court properly dismissed Count II." (Emphasis added).

This Court denied certiorari in each case. 373 U.S. 914 (1962); 387 U.S. 932 (1967).

These two cases definitely establish that due process does not require public meetings before starting a pub-

---

1. The Illinois Act was also in effect at the time of each of these cases, having been enacted July 11, 1957. Chap. 102, Ill. Rev. Stats. 1971, §42 et seq. Petitioner's statement that it was enacted after these cases were decided—with the implication that the result might have been different—is incorrect.

lic works project. The existence or non-existence of a statute was not considered a controlling factor in either decision. Indeed, a better argument could be made that a federal statute creates federal rights than the argument of petitioners that a state statute creates federal rights. In neither of these cases did the court consider the existence of the federal statute to be significant in reaching a decision.

Another case similar to the one now before the court is *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill., 1955). In that case plaintiffs alleged a violation of their federal constitutional rights as a result of the failure of the Toll Highway Commission, respondents' predecessor, to hold public hearings regarding the location of the proposed toll road. The court dismissed the action, holding that a federal question was not involved, stating:

> "Even if, as plaintiffs claim, defendants, in exercising their delegated discretion in locating the routes and termini of toll roads, have made mistakes, in failing to have the proposed Illinois toll road meet a similar Indiana road at the state line, or otherwise, that fact is not a sufficient reason for a federal court to assume jurisdiction under the due process clause of the United States constitution. These public officials are human beings. To err is human. On the other hand, if they are guilty of improper action due, not merely to error of judgment, but to bad faith, fraud, corruption, manifest oppression or a clear abuse of discretion, the state courts are open to those whose rights are threatened, *People* v. *State Toll Highway Commission*, 3 Ill. 2d 218, 120 N.E. 2d 35. Therefore, in such circumstances also, no resort to the federal courts is permitted. *In neither of these classes of cases is a federal question involved.*"

The decision in that case was affirmed by this court at 349 U.S. 942 (1955).

The petitioners cite cases for the proposition that where an alleged wrong is in violation of both a state and a federal law, a claimant can choose either the state or the federal forum to file his claim. *Monroe* v. *Pape*, 365 U.S. 167 (1960); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932); *Smyth* v. *Ames*, 169 U.S. 466 (1898). These cases have no application to the case at bar since the alleged wrong—the denial of an open hearing—could violate only a state and not a federal law. To choose the federal forum, there must first be a federal remedy available.

We know of no cases holding that public hearings on highway construction projects are required by the 14th Amendment. The law is clearly to the contrary.

(c)

THE ENVIRONMENTAL "RIGHTS" ALLEGEDLY VIOLATED WITHOUT DUE PROCESS OF LAW ARE NOT RECOGNIZED AS LEGAL RIGHTS IN THE CONSTITUTION, STATUTES OR CASE LAW.

The petitioners allege that certain of their "rights" have been violated without due process of law since they were allegedly denied an open hearing prior to condemnation proceedings to acquire land for an Illinois Tollway extension. However, the very "rights" which petitioners allege were violated are not legally recognized rights and hence are not protected by due process. These so-called rights are the alleged rights to a healthful and protected environment. Such alleged environmental rights are afforded no legal recognition or protection in the constitution or statutes or by case law.

The petitioners argue that Congress has established a legal right to a healthful and protected environment in

the National Environmental Policy Act of 1969, 42 U.S.C., § 1421, et seq. However, as will appear more fully in the next section of this brief, that Act is limited to setting up procedural requirements for federal agencies aimed at requiring those agencies to recognize the environmental impact of federal projects. The Act does not establish or recognize the existence of any substantive environmental rights.

The cases cited by petitioners with regard to the existence of a federal claim where state officials arbitrarily and capriciously deprive a person of his legally protected rights are not in point because, in the case at bar, the petitioners were deprived of no legally protected rights. *Missouri Pacific Railway Company* v. *Humes*, 115 U.S. 512 (1885); *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U.S.) 235 (1819).

The cases cited by petitioners with regard to the progressive and expanding nature of the concept of due process have reference to the changing definition of already recognized legal rights and are not authority for the judicial creation of completely new rights. *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Holden* v. *Hardy*, 169 U.S. 366 (1898).

It might be that at some future date Congress will establish certain definite legal rights with regard to the environment. When and if those legal rights are so established, they will be protected against violation without due process of law. But there cannot be a deprivation of due proces without regard to indefinite environmental "rights" which have no legal recognition.

III.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970 ARE APPLICABLE ONLY TO FEDERAL AGENCIES AND CREATE NO SUBSTANTIVE RIGHTS UPON WHICH TO BASE A FEDERAL CLAIM AGAINST STATE DEFENDANTS.

The Court of Appeals, in holding that the National Environmental Policy Act of 1969, 42 U.S.C., § 4321, et seq. (N.E.P.A.), and the Environmental Quality Improvement Act of 1970, 42 U.S.C., § 4371, et seq. are applicable only to federal agencies and create no substantive rights, stated:

> "Since the procedural requirements of the National Environmental Policy Act are applicable only to federal agencies, it is patently clear that these requirements have no pertinence to the facts of this case. Other than the procedural requirements just mentioned, no judicially enforceable duties are created by either the National Environmental Policy Act or the Environmental Quality Improvement Act. The declarations of a national environmental policy and a statement of purpose appearing in these acts are not sufficient to establish substantive rights. For these reasons, the plaintiffs have asserted no cognizable federal rights under these statutes." (Appendix to Petition, 6A).

The arguments of the petitioners distort the clear purpose and meaning of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., (NEPA) and the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 et seq. The petitioners isolate the initial section of each Act, while completely ignoring all the other sections, and attempt to argue that the Congress has

established the broadest possible set of environmental rights. In fact, when these Acts are viewed as a whole, it is clear that they establish no substantive rights whatever. Further, when the Acts are viewed as a whole it is equally clear that they apply exclusively to agencies of the federal government and have no application to a state agency or state officials.

The sections of these acts relied on by the petitioners were not intended to be enactments of law but rather Congressional policy averments to assist in understanding the more substantive provisions that follow. For example, the Bituminous Coal Conservation Act of 1935 contained in its initial section an extended Congressional declaration of the reasons why the welfare of the nation required the regulation of the bituminous coal industry and the remaining sections of that Act set out the manner of regulation, including the establishment of a national commission. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the United States Supreme Court stated with regard to the declarations of the initial section of the Bituminous Coal Act that:

> "These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.
>
> The substantive legislation begins with § 2, which establishes in the Department of the Interior a National Bituminous Coal Commission . . . : 298 U.S. 238 at 280.

In each of the environmental acts involved in the instant case the substantive legislation begins after the policy declarations of the initial sections and in each case includes the establishment of a new federal agency. However, each act clearly fails to give such rights of action

against state agencies and officers as are sought herein. These Acts, in their entirety, are set out in the appendix to this brief. A detailed discussion of each now follows.

(a)

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act of 1969, 42 U.S.C., § 4321 et seq. (NEPA), is a federal act passed by Congress to establish a Council on Environmental Quality and it is aimed at requiring Federal Agencies to recognize the environmental consequences of their actions. It compels Federal Agencies to satisfy certain procedural requirements with regard to the environmental impact of their policies. Nowhere in NEPA is there a reference to any state agency nor is the word "state" even mentioned. The highway extension involved in this case is a state project; the only respondents in this case are a state agency and state officials; and it is not alleged in the complaint that any funds other than state funds are involved. NEPA plainly does not impose any requirements, procedural or otherwise, on state agencies or state officials and the allegations of the complaint do not state a federal claim under NEPA.

The petitioners base their arguments only on Section 101 of NEPA, 42 U.S.C., § 4331 and completely ignore the rest of the Act. Section 101 of the Act is a statement of policy and therein Congress expresses concern over the damage that man has inflicted and continues to inflict on his environment. This broad policy stated in Section 101 is implemented in the following sections of NEPA. However, the implementation is expressly with

regard to federal agencies alone, and this is why the petitioners choose to ignore all but Section 101 of the Act.

The entire National Environmental Policy Act of 1969 is set out in the appendix to this brief. A reading of the Act as a whole clearly shows the Congressional intent to establish a broad national environmental policy and implement that policy by establishing a Council on Environmental Quality and setting up certain environmental procedure requirements for federal agencies.

NEPA begins with a Congressional declaration of purpose which states:

> "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321.

After the declaration of purpose, the Act is divided into Title I and Title II. Section 101 of the initial title (the only section relied upon by petitioner) begins with a declaration of a broad national environmental policy. The broad policy of Section 101 is implemented with regard to federal agencies by the remaining sections of Title I, especially Section 102. Section 102 (c) provides that when any *federal* agency contemplates any major federal action which could significantly affect the quality of the human environment, it must prepare and file with the Council on Environmental Quality a "detailed impact statement" on:

"(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C., § 4332 (2) (c).

Title II of NEPA establishes the Council on Environmental Quality as part of the Executive Branch of government to assist the President in evaluating the environmental effect of the various programs and activities of the Federal Government. Title II also requires the President to annually transmit to Congress an "Environmental Quality Report."

NEPA does not declare any substantive environmental rights as argued by petitioners. Nor does it prohibit any particular activities or programs which might have a detrimental effect upon the environment. NEPA simply declares a broad national policy aimed at encouraging concern for the environment; sets up procedural requirements for federal agencies, such as the preparation and filing of environmental impact statements, to insure that federal agencies take environmental factors into consideration in planning federal programs; and, finally, through the Council on Environmental Quality, seeks to provide the President and the Congress with the necessary environmental information on which to base further legislation.

The Act as a whole appears as a logical and worthwhile initial venture by Congress into the area of environmental control. But it is clearly limited in its application to federal agencies. It is this clear limitation to federal agencies that leads the petitioners in their argument to ignore completely all but the initial section of NEPA. To succeed, the petitioners must read into this part of the Act, the creation of substantive rights against the state.

The words of the Act upon which the petitioners rely most in their attempt to "read in" substantive rights are contained in Section 101 (c) which provides:

> "(c) The Congress recognizes that each person *should* enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." (Emphasis added). 42 U.S.C. § 4331 (c).

Two significant points should be noted. Subsection (c) is limited by the introductory phrase, "The Congress recognizes", which immediately casts doubt as to its legal scope. But even more significant is that the word "should",[2] which is used to describe that to which each person is entitled in the way of a healthful environment, is not a word which presently delineates the specific rights of the individual or a word which now enjoins specific duties on any state or state agency. Had Congress wished to create a cause of action on behalf of persons

---

2. While the word "should" is often used in the imperative ("You should keep to the right whenever driving on a two-lane highway") it is also often used to express the ideal ("People should not have to grow old and die"). As used in this Act the word "should" is clearly being used to express an ideal or goal which Congress hopes will some day be achieved.

aggrieved by a violation of the Act, it could have done so by clearly spelling out such a right. Indeed, the legislative history of the Act indicates that this possibility was considered and rejected, for the Senate bill originally contained a provision stating that Congress recognizes that

> " . . . each person *has a fundamental and inalienable right* to a healthful environment ***" (H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969). (Emphasis added).

It is submitted that even the wording of the original Senate bill would not have created a present "right". The wording of the statute as finally enacted, embodying a mere statement of what should be the case, clearly creates no cause of action.

The Senate bill was originated by Senator Jackson as S. 1075. The Report of the Senate Committee on Interior and Insular Affairs, after enumerating the environmental problems confronting the nation, states:

> "S. 1075 is designed to deal with many of the basic causes of these increasingly troublesome and often critical problems of domestic policy. A primary purpose of the bill is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment. *It is the Committee's belief that S. 1075 will also provide a model and a demonstration to which State governments may look* in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management. This objective is of great importance because many of the most serious environmental problems the Nation faces are within the scope and, often, within the exclusive jurisdiction of State action and State re-

sponsibility." Cong. Record, July 10, 1969, p. 19010 (Emphasis added).

The Act, quite obviously, was merely intended first, as a statement of policy that environmental considerations shall form a part of all federal agency functions, planning and coordination, and, secondly, to create a Council on Environmental Quality. The discussions on the floors of the House and Senate indicate as much, and emphasize that the most important purpose of the Act was to create a Council which could share its findings with all other federal agencies, enabling them to develop meaningful environmental policies at lower levels of government. See 115 Cong Record, 91st Cong., 1st Sess., p. 26571-26591 and p. 29046-29065 (1969).

With regard to judicial enforcement of the provisions of NEPA, Federal agencies are charged with certain procedural requirements and the failure to comply, such as the failure to file an impact statement when major federal action which could affect the environment is contemplated, can result in a federal court review of their administrative action. *Calvert Cliffs* v. *A.E.C.*, 449 F. 2d 1109, (C.A.D.C., 1971) (Atomic Energy Commission —— filing of impact statement), *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir., 1971) (National Forest Supervisor—failure to file an impact statement); *Environmental Defense Fund* v. *Corps of Engineers of U.S. Army*, 325 F. Supp. 749 (E. D. Arkansas, 1971) (Corps of Engineers—where an insufficient impact statement was filed); *State Committee to Stop Sanguine* v. *Laird*, 317 F. Supp. 664 (W. D. Wisc., 1970) (Department of Defense—alleged failure to cooperate with other federal agencies on environmental fac-

tors); *Sierra Club* v. *Hardin*, 325 F. Supp. 99 (D. Alaska, 1971) (Secretary of Agriculture—filing of impact statement).

The federal courts have also held that the procedural requirements of NEPA do not apply retroactively. *Brooks* v. *Volpe*, 319 F. Supp. 90 (W. D. Wash., 1970); *Investment Syndicates, Inc.* v. *Richmond*, 318 F. Supp. 1038 (D. Oregon, 1970); *Pennsylvania Environmental Council, Inc.*, v. *Bartlett*, 315 F. Supp. 238 (M.D. Penn., 1970).

All the above cited cases deal with the procedural requirements placed on federal agencies by NEPA and the willingness of federal courts to enforce these procedural requirements. There are no reported cases enforcing individual environmental rights under NEPA because no such rights are created by NEPA and a complaint, such as the one in the instant case, which asserts a violation of these non-existent rights, does not state a claim of which federal courts may take cognizance.

The Federal courts have clearly held that a federal question is not presented under NEPA when purely state or local actions are involved. The Court of Appeals for the Fourth Circuit took this position in *Civic Improvement Committee* v. *Volpe*, —— F. Supp. —— (W.D.N.C., 1972) 459 F. 2d 957 (4th Cir., 1972) In that case the District Court had refused to issue a preliminary injunction against the widening of a city street financed solely by city money, on the grounds that the NEPA was not applicable to local projects. Plaintiffs therein apparently did not dispute this reasoning, but contended on appeal that because the street would tie in with other highway improvements which admittedly were federally funded, the project was sufficiently "federal" to involve the NEPA. The Court of Appeals disagreed, and held that

NEPA was not applicable because no major federal action was involved, and stated at page 958:

> "Despite the breadth of the NEPA we think there are doubtless local projects that may be destructive of environmental assets that are not within the ambit and protection of the Act. If America's environment is to be preserved in accordance with the national policy expressed by the Congress the gap will have to be filled with state and local legislation."

City of Boston v. *Volpe*, —— F. 2d —— (C.A. 1, 1972) [4 ERC 1337] was a suit to enjoin the Massachusetts Port Authority from expanding an airport taxiway. The Authority had applied for federal funds, but their application was returned by the F.A.A. because no environmental impact statement had been prepared. Construction was therefore begun with state funds, and the city sought to invoke the NEPA to halt the project on the grounds that the application for federal aid was sufficient to make the project "federal" and thus bring it within the scope of the NEPA. The lower court's denial of a request for a preliminary injunction was affirmed by the Court of Appeals. While the court did not squarely *hold* that federal funding was a *sine que non* for the NEPA to apply, it is evident from the opinion that the court clearly presumed this to be so, and relied upon that reasoning in reaching the conclusion that the NEPA did not apply.

Other Court of Appeals cases similarly hold that the procedural requirements of NEPA are limited in their application to federal agencies and federal projects. *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir., 1971); *Miltenberger* v. *Chesapeake and Ohio Railway Co.*, 450 F. 2d 971 (4th Cir., 1971).

Environmental Defense Fund v. *Corps of Engineers of the U.S. Army, et al.*, 325 F. Supp. 749 (E. D. Arkansas,

1971) is a case that enunciates the differences that exist between Section 101 and the other Sections of the National Environmental Policy Act of 1969. This was an action seeking to enjoin the Corps of Engineers of the United States Army, the Secretary of the Army and the Chief of Engineers from proceeding with the construction of a dam across an Arkansas river. The action was based on environmental factors and claimed jurisdiction under NEPA. The court held that Section 101 of NEPA was a statement of policy and created no substantive rights giving rise to the permanent enjoining of the dam project. The court further held that the plaintiffs were relegated to the procedural requirements under Section 102 of NEPA and entered a temporary injunction until the defendants filed the "detailed impact" statements required by Section 102 of NEPA. The court stated at page 755:

> "This brings us to the heart of the case which involves the interpretation and application of NEPA.
>
> "Plaintiffs contend that NEPA creates some 'substantive' rights in addition to its procedural requirements. They base this contention on the language contained in §101 of the Act. Although the Court may be oversimplifying their position in this respect, essentially they claim that the Act creates rights in the plaintiffs and others to 'safe, healthful, productive, and esthetically and culturally pleasing surroundings;' and to 'an environment which supports diversity and variety of individual choice,' and 'the widest range of beneficial values.' See §101(b). The Court disagrees.
>
> "Section 101 (a) takes note of the environmental problems facing the nation and then declares it to be the policy of the federal government to use all practical means 'to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other re-

quirements of present and future generations of Americans.' In order to carry out this policy, §101 (b) declares it to be the 'continuing responsibility of the Federal Government to use all practicable means *** to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—' attain certain stated objectives, including those quoted above, which plaintiffs contend create substantive rights.

"The Act appears to reflect a compromise, which, in the opinion of the Court, falls short of creating the type of 'substantive rights' claimed by the plaintiffs. Apparently the sponsors could obtain agreements only upon an Act which declared the national environmental policy. This represents a giant step, but just a step. It is true that the Act required the government 'to improve and coordinate Federal plans, functions, programs, and resources,' but it does not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment envisioned therein.

"In the instant case it is clear that the damming of the Cossatot will reduce 'diversity and variety of individual choice.' It is apparently plaintiffs' view that upon the basis of such a finding the Court would have the power, and duty, ultimately and finally to prohibit the construction of a dam across the Cossatot. No reasonable interpretation of the Act would permit this conclusion. If the Congress had intended to leave it to the courts to determine such matters; if, indeed, it had intended to give up its own prerogatives and those of the executive agencies in this respect, it certainly would have used explicit language to accomplish such a far-reaching objective. In view of this interpretation of NEPA by the Court, the plaintiffs are relegated to the 'procedural' requirements of the Act."

The facts in the foregoing case involved a federal agency, federal officials and a federal project, and the Court

could find no substantive rights under Section 101 of NEPA. The instant case involves a state agency, state officials and a state project.

In *Tanner* v. *Armco Steel,* 3 E.R.C. 1968 (So. Dist. of Texas, 1972), the District Court in holding that NEPA created no substantive legal rights, stated at page 1972:

> "Had the Congress intended to create a positive and enforceable legal right or duty, it would have said so, and would not have limited itself to words of entreaty."

Senator Jackson, NEPA's principal sponsor, stated with reference to the procedural requirements of Section 102 that "[n]o agency will (now) be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." He characterized the requirements of Section 102 as "action forcing" and stated that "[o]therwise, these lofty declarations [in Section 101] are nothing more than that." Hearings on S. 1075, S. 237 and S. 1752 before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). See also *Calvert Cliff's* v. *A.E.C.,* 449 F. 2d 1109, 1113; (C.A.D.C., 1971).

When federal court complaints relying on NEPA for jurisdiction alleged the breach of duties other than the procedural requirements set out in NEPA, the courts have dismissed even though Federal agencies were involved.

In *Bucklein* v. *Volpe,* 2 E.R.C. 1082 (N.D. of Calif., 1970), a taxpayer brought an action in federal court for declaratory and injunctive relief against federal, state and county officials in connection with the performance of federal statutory duties regarding the application for and disbursement of federal emergency relief funds for

road repair. The local officials who were defendants were alleged to have violated procedural due process in the performance of their duties. Federal jurisdiction was based in part on alleged violations of the National Environmental Policy Act of 1969. The court dismissed the action for failure to state a claim upon which relief could be granted and with regard to NEPA stated at page 1083:

> "Moreover, it is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the Council, the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. 42 U.S.C., Section 4331. It is unlikely that such a generality could serve or was intended to serve as a source of court-enforcible duties." See also *San Francisco Tomorrow* v. *Romney*, 342 F. Supp. 77 (N.D. Calif. 1972).

In *McQueary* v. *Laird*, 449 F. 2d 608 (10th Cir., October 21, 1971), an action based on NEPA and brought by various residents of Colorado to enjoin the storing of chemicals and biological warfare agents at Rocky Mountain Arsenal, the district court dismissed the action and dismissal was affirmed on appeal with the Court of Appeals for the 10th Circuit, stating at page 612:

> "Public disclosure relating to military-defense facilities creates serious problems involving national security. We hold that NEPA does not create substantive rights in the plaintiff-appellants here to raise the environmental challenge in regard to the Rocky Mountain Arsenal."

In the instant case, the plaintiffs do not even refer to the procedural requirements of NEPA which clearly apply only to federal agencies and which provide the only court-enforcible duties under the Act.

The only case relied on by petitioners which in any way construes the provisions of NEPA is a district court case which does not appear in any official reports, *Izaak Walton League* v. *Macchia*, 2 E.R.C. 1661 (D. N.J., 1971). This was an action to enjoin the dredging and filling of certain tidal marshes by private land developers. Joined as defendants were officials of the State of New Jersey who allegedly had granted the developers permits for the dredging and filling operations. Also joined as defendants were Stanley A. Resor, Secretary of the United States Army and Colonel James A. Johnson, United States Army Corps of Engineers. With respect to the federal defendants it was alleged that part of the dredging and filling was in a navigable waterway of the United States and that it was taking place with the permission of these federal defendants and with a detrimental effect on the environment. Federal jurisdiction was alleged to exist on the basis of a variety of federal acts in addition to the recent environmental legislation involved in the instant case—the Water Quality Improvement Act of 1970, 33 U.S.C. §1151; Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §661 et seq.; Rivers and Harbors Act of 1899, 33 U.S.C. §403; and the Refuse Act of 1899, 33 U.S.C. §407. The District Court in the *Izaak Walton* case denied a motion to dismiss.

It is impossible to tell from the Court's opinion in *Izaac Walton* v. *Macchia*, *supra*, exactly on what basis the District Court found federal jurisdiction since the opinion itself deals mainly with the issue of standing and

the Court never specifies which of the many federal acts involved conferred jurisdiction. In any case, it is distinguishable from the instant case because it involved federal defendants and the acts allegedly detrimental to the environment (dredging and filling) were occurring in a navigable waterway of the United States and with the alleged approval of the United States Corps of Engineers. In the instant case there are no federal defendants and the acts allegedly detrimental to the environment involve the building of a state-funded tollway.

Nowhere in *Izaak Walton* v. *Macchia, supra,* does the Court indicate that NEPA establishes any substantive rights. However, the Court did state:

> "The Congressional intent is clear. The judicial function is to give force to the avowed legislative purpose and nowhere in the Acts is there any intimation that judicial review of administrative action is foreclosed. *Izaak Walton League* v. *Macchia,* 2 E.R.C. 1661, 1669-70 (D. N.J., 1971)"

This language makes it clear that the court is talking about reviewing administrative action and not enforcing substantive rights. A federal agency is involved in the case—the United States Corps of Engineers—and if the approval of the dredging and filling of a navigable waterway of the United States is a major federal action that could have substantial effect upon the environment, that federal agency was required under NEPA to prepare and file a proper environmental impact statement. Certainly a federal court has jurisdiction to determine compliance with the procedural requirements of NEPA. The administrative action of a federal agency is not involved in the instant case since no federal officials or federal agencies are defendants.

Federal court review under NEPA of the administrative action of a federal agency with regard to dredging and filling of a navigable waterway of the United States has occurred in another case. *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir., 1970), was an action brought to compel the Secretary of the Army to issue a permit for dredging and filling in navigable waters of the United States. A ruling for the plaintiff was reversed by the Circuit Court of Appeals which upheld the administrative decision of a federal agency in denying such a permit for ecological reasons. Relying on the procedural mandates of NEPA to federal agencies, the Court held that the Secretary of the Army properly took ecological factors into consideration in weighing the application for such a permit. This is the real purpose of NEPA—to require federal agencies to weigh environmental factors in reaching decisions—not to establish substantive rights.

In its decision, the Court of Appeals held that the NEPA is directed to federal agencies and is not applicable to independent state or local governmental actions. Petitioners claim that the court was led astray in this respect by certain language found in *San Antonio Conservation Society* v. *Texas Highway Department*, 400 U.S. 968 (1970). Plaintiffs in that case sought to halt construction of a federally funded highway through a San Antonio park because the U.S. Department of Transportation had failed to prepare the required environmental impact statement. Although this court dissolved the stay order and denied certiorari, Mr. Justice Douglas wrote a strongly-worded dissenting opinion, arguing (as we interpret the opinion) that the NEPA was clearly applicable when federal funds and major federal actions were involved, and that failure of the government to prepare

an impact statement in those circumstances gave the federal courts jurisdiction. However, Justice Douglas also recognized that a federal question is not presented under the NEPA when purely state or local actions are complained of, stating "No federal question would, of course, be presented if Texas or San Antonio decided to turn these park lands into a biological desert." 400 U.S. 968 (1970).

While this statement in *San Antonio* may not have been essential to the opinion—since federal funding was in fact involved—we submit that it is a correct statement of the law.

(b)

THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

The Environmental Quality Improvement Act of 1970, 42 U.S.C. §4371 et seq., is also relied on by petitioners in an effort to state a federal claim and establish federal jurisdiction. The Act is relatively short and contains only four sections, but it is clearly limited in its application to agencies of the federal government and has no application to the construction of a state-funded highway by state officials which is the subject matter of this case.

As they did with NEPA, the petitioners have confined their arguments to the initial section of the Environmental Quality Improvement Act and then only to part of this section. The plaintiffs conveniently ignore the part of the first section which sets out the purposes of the Act and which states:

"(c) The purposes of this chapter are—

(1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190." 42 U.S.C. § 4371 (c).

Both of the express purposes of the Act are implemented in the very next Section of the Act where the Congress establishes the Office of Environmental Quality. 42 U.S.C. § 4372. The Office of Environmental Quality is given the duties of assisting and advising the President on the policies and programs of the Federal Government affecting environmental quality. This new Office will provide the professional and administrative staff for the three-man Council on Environmental Quality established by NEPA and insure that other federal departments and agencies are implementing the policies set down by NEPA and other environmental laws. The final two sections of the Environmental Quality Improvement Act deal with reporting and funding. 42 U.S.C. § 4373 and § 4374.

Nowhere in the Act is there any mention that one of the purposes was to create "rights" in persons such as the plaintiffs; nor can any such rights be found by a reading of the statute as a whole or any part of the statute. Moreover, the discussions on the floor of the House and Senate with respect to this enactment do not reveal any such intent. [116 Cong. Record, March 24, 1970, pp. S 4392-4425; March 25, 1970, pp. H 2464-2473; 1970 U.S. Code Cong. and Adm. News p. 867].

It is therefore concluded that Congress did not intend to create the "rights" upon which plaintiffs have based their complaint. The statement by Congress which is relied on almost exclusively by the petitioners in their efforts to read substantive rights into the Act—that the primary responsibility for implementing the declared national environmental policy rests with state and local government—is a policy statement. This statement was meant to manifest an intent that federal and state governments cooperate to achieve a better environment through regional organizations, as is evidenced by the next sentence in the statute which the plaintiffs conveniently ignore:

> "The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law." 42 U.S.C. § 4371 (b) (3).

It is perhaps significant that, although there have been a number of case decisions based upon the National Environmental Policy Act of 1969, no such cases have arisen under the Environmental Quality Improvement Act of 1970. It is submitted that there is good reason for this: The "rights" upon which petitioners' complaint must stand or fall exist only in the minds of petitioners. To be enforceable in the federal courts the statute must manifest a Congressional intent to create a right, not to declare a policy. This the Act does not do.

CONCLUSION

Further review of this case is not warranted. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOHN R. LAVERY,
WALTER K. PYLE,
Assistant Attorneys General,
FRANK S. RIGHEIMER, JR.,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois 60603, 312-726-5646,
Attorneys for Respondents.

FRANK S. RIGHEIMER, JR.,
WALTER K. PYLE,
PATRICK J. AGNEW,
Of Counsel.

APPENDIX

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

(42 U.S.C. § 4321 et seq.)

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable

means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a

responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity ,and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major

natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and forseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to

formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

Sec. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authorative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere with the achievement of the policy set forth in title 1 of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement

of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

(42 U.S.C. § 4371 et seq.)

SHORT TITLE

Sec. 201. This title may be cited as the "Environmental Quality Improvement Act of 1970."

FINDINGS, DECLARATIONS, AND PURPOSES

Sec. 202. (a) The Congress finds—

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b)(1) The Congress declares that there is a national policy for environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water

and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title are—

(1) To assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Law 91-190.

OFFICE OF ENVIRONMENTAL QUALITY

Sec. 203. (a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this title referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Bureau of the Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions under this title and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and pay such specialist and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by—

(1) providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91-190;

(2) assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

(3) reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

(4) promoting the advancement of scientific knowledge of the effects of actions and technology on the

environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

(5) assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

(6) assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;

(7) collecting, analyzing, and interpreting data and information on environmental quality, ecological research and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to sections 3648 and 3709 of the Revised Statutes (31 U.S.C. 529; 41 U.S.C. 5) in carrying out his functions.

REPORT

Sec. 204. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

AUTHORIZATION

Sec. 205. There are hereby authorized to be appropriated not to exceed $500,000 for the fiscal year ending June 30, 1970, not to exceed $750,000 for the fiscal year ending June 30, 1971, not to exceed $1,250,000 for the fiscal year ending June 30, 1972, and not to exceed $1,500,000 for the fiscal year ending June 30, 1973. These authorizations are in addition to those contained in Public Law 91-190.